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**IN THE
COURT OF APPEALS OF INDIANA**

MILLICENT BROWNRIGG,

Appellant-Defendant,

VS.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 49A02-0610-CR-860

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Evan Goodman, Judge
Cause No. 49F15-0502-FD-29308

June 13, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Millicent Brownrigg appeals her sentence of three years following her conviction for two counts of Class D felony criminal recklessness and one count of Class D felony intimidation. We affirm.

Issue

The sole issue Brownrigg raises on appeal is whether her sentence is proper.

Facts

On February 23, 2005, Marlonda Tigner and Taffia Mayes were standing next to a police car occupied by Officer Jerry Pullings of the Indianapolis Police Department. While Tigner and Mayes were talking with Officer Pullings about a domestic incident that had occurred earlier, Brownrigg drove a Chevy Cavalier at a high rate of speed into the driver's side of the police car, crushing Tigner's leg. Brownrigg then got out of her car holding a tire iron and chased Tigner around the car, stating that she was going to kill her. While chasing Tigner, Brownrigg used the tire iron to hit the police car several times on the hood and trunk.

The State charged Brownrigg with two counts of Class D felony criminal recklessness, one count of Class D felony intimidation, one count of Class D felony battery on a law enforcement officer, one count of Class D felony criminal mischief, one count of Class A misdemeanor battery, and one count of Class A misdemeanor driving with a suspended driver's license. Pursuant to a plea agreement, Brownrigg pled guilty to two counts of criminal recklessness and one count of intimidation. The State dropped the charges of battery on a law enforcement officer, criminal mischief, battery, and driving

with a suspended license. The State also agreed to a sentencing cap of three years executed. The trial court sentenced Brownrigg to three years incarceration, with two and one-half years suspended, and ordered her to pay restitution of \$2,640 for the damage to the police car. Brownrigg now appeals.

Analysis

Brownrigg asserts that the trial court did not properly consider the aggravating and mitigating circumstances, and the sentence is inappropriate in light of the nature of the crime and her character. In response to the Supreme Court's decision in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004), our legislature amended the sentencing statutes to replace "presumptive" sentences with "advisory" sentences, effective April 25, 2005. Under the post-Blakely statutory scheme, a court may impose any sentence that is authorized by statute and permissible under the Indiana Constitution "regardless of the presence or absence of aggravating circumstances or mitigating circumstances." Ind. Code § 35-38-1-7.1(d). For purposes of felony sentencing, an "advisory sentence" is "a guideline sentence that the court may voluntarily consider as the midpoint between the maximum sentence and the minimum sentence." I.C. § 35-50-2-1.3.

Brownrigg committed these offenses on February 23, 2005, prior to the change in the sentencing statute. She was sentenced on September 5, 2006, after the sentencing change became effective. When the crime has been committed prior to the change in law, we apply the "presumptive" statute rather than the "advisory" statute. Weaver v.

State, 845 N.E.2d 1066, 1072 (Ind. Ct. App. 2006), trans. denied. Therefore, we consider Brownrigg’s appeal under the “presumptive” sentencing statute.

The presumptive sentence under the prior statute was one and one-half years imprisonment for each Class D felony; the minimum sentence was six months, and the maximum was three years. See Ind. Code § 35-50-2-7 (2004). Brownrigg was sentenced to three years for each conviction, to be served concurrently. Brownrigg challenges the trial court’s finding of aggravating factors to justify the enhancement of her sentence under Blakely. Blakely requires that, “other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” Smylie v. State, 823 N.E.2d 679, 682 (Ind. 2005), cert. denied.

Brownrigg specifically asserts that the trial court’s mention of her “outrageous behavior” was an invalid aggravating factor under Blakely because the underlying facts of her behavior were not submitted to a jury. Appellant’s Br. p. 9. Brownrigg notes two occasions during the sentencing hearing in which the court mentioned her behavior. The first occurred prior to naming the sentence, in which the court stated:

It’s a terribly difficult sentencing to do from my perspective . . . [because] she’s been doing what she’s supposed to do and improving her life and so on. But it is hard to get over the injury that she inflicted on the victim, policeman and the damage to the vehicle, the outrageous behavior.

Tr. p. 40. The second instance of mentioning her behavior occurred after the sentence was pronounced. The court stated:

You're doing great and I'm sorry that I'm sending you to jail at all. I just don't see how I can avoid seeing the outrageous, crazy behavior that you permitted the drugs to put you in that position

Tr. p. 43. However, when the trial court was actually engaged in issuing her sentence, it did not mention her behavior at all. The court explicitly named the aggravating factors it was considering: “upon review of [her] criminal history of doing drugs in the military, having a dishonorable discharge and spending time in Leavenworth for three years, they are aggravating circumstances. The fact that [she had] been in therapy before . . . but it hasn't helped. . . are aggravating circumstances.” Tr. p. 41. The court then explicitly named as mitigating circumstances that she had been drug-free for nine months and was trying to make positive changes in her life. We conclude that when the trial court mentioned Brownrigg's behavior, it did so only in the context of expressing sympathy for her. There is no indication that the court was considering the circumstances of the case as an aggravating factor.

It is unclear whether Brownrigg is challenging under Blakely any of the aggravating factors that the court explicitly found. Brownrigg's failure to present a cogent argument results in a waiver of that issue. McMahon v. State, 856 N.E.2d 743, 751 (Ind. Ct. App. 2006). Regardless, Brownrigg would not prevail on this issue. For Blakely purposes, a trial court could enhance a sentence under Indiana's “presumptive” sentencing scheme based only on those facts that were established in one of several ways: 1) as a fact of prior conviction; 2) by a jury beyond a reasonable doubt; 3) when admitted by a defendant; and 4) in the course of a guilty plea where the defendant has waived

Apprendi rights and stipulated to certain facts or consented to judicial factfinding. Trusley v. State, 829 N.E.2d 923, 925 (Ind. 2005) (citing Blakely v. Washington, 542 U.S. 296, 301, 124 S. Ct. 2531, 2536 (2004)). Brownrigg's prior criminal history of drug possession is permitted as an aggravator under Blakely because it is a fact of prior conviction. Brownrigg stated at the sentencing hearing that she had sought treatment for drug abuse in the past and it had not been successful because she "just wasn't ready to stop using." Tr. p. 40. Because Brownrigg made this admission to the court, Blakely is also satisfied as to this aggravator.

The final aggravator, Brownrigg's dishonorable discharge from the military, was included in the pre-sentence investigation report ("PSI"), which Brownrigg acknowledged at the sentencing hearing did not need correction. Our supreme court has noted that the use of an admission of the accuracy of a PSI implicates the defendant's Fifth Amendment right against self-incrimination. Ryle v. State, 842 N.E.2d 320, 323 (Ind. 2005), cert. denied. However, the court concluded that "judicial records" used to compile the PSI demonstrate conclusive significance and can be used to enhance a sentence. Ryle, 842 N.E.2d at 825. Although an official record from the military might be sufficiently conclusive under Ryle, Brownrigg's PSI stated that the probation officer was unable to locate any information concerning the military discharge that Brownrigg had reported. We conclude that because there was not a record demonstrating conclusive significance of Brownrigg's dishonorable discharge it was inappropriate for the trial court to consider this as an aggravator. However, a single valid aggravating circumstance may be sufficient to sustain an enhanced sentence. Caron v. State, 824 N.E.2d 745, 756 (Ind.

Ct. App. 2005) trans. denied. When a trial court improperly applies aggravating circumstances but other valid aggravating circumstances exist, a sentence enhancement may still be upheld. Id. Because two other valid aggravators exist, Brownrigg's sentence enhancement is not in error.

Brownrigg also makes a non-Blakely challenge to an enhanced sentence because the trial court did not consider as a mitigator Brownrigg's guilty plea. When faced with a non-Blakely challenge, we must determine whether the trial court issued a sentencing statement that (1) identified all significant mitigating and aggravating circumstances; (2) stated the specific reason why each circumstance is determined to be mitigating or aggravating; and (3) articulated the court's evaluation and balancing of the circumstances. Perry v. State, 845 N.E.2d 1093, 1096 (Ind. Ct. App. 2006), trans. denied. In the presence of an irregularity in a trial court's sentencing decision, we have the option to remand to the trial court for a clarification or new sentencing determination, to affirm the sentence if the error is harmless, or to reweigh the proper aggravating and mitigating circumstances independently at the appellate level. Perry, 845 N.E.2d at 1096.

Brownrigg asserts that the trial court failed to find a significant mitigating factor, her guilty plea. Generally, a guilty plea is accorded mitigating weight. Where the State reaps a substantial benefit from the defendant's act of pleading guilty, the defendant deserves to have a substantial benefit returned. Sensback v. State, 720 N.E.2d 1160, 1165 (Ind. 1999). However, a guilty plea is not automatically a significant mitigating factor. Payne v. State, 838 N.E.2d 503, 508 (Ind. Ct. App. 2005), trans. denied. In Payne, we found the defendant's guilty plea was entitled to minimal mitigating weight

because the defendant received a benefit from the guilty plea in that the State dismissed three charges. Id. at 509; see also Davies v. State, 758 N.E.2d 981, 987 (Ind. Ct. App. 2001) (holding that the trial court did not abuse its discretion in failing to accord mitigating weight to the guilty plea where the court determined that the plea was “more likely the result of pragmatism than acceptance of responsibility and remorse”) trans. denied.

Brownrigg pled guilty as the result of a plea agreement that dismissed two Class D felony charges and two Class A misdemeanor charges. She also received the benefit of a sentence cap of three years. Her guilty plea was not merely the result of pragmatism; Brownrigg did acknowledge responsibility and apologized for her actions at the sentencing hearing. However, she received a substantial benefit from her guilty plea, and we find the guilty plea only warrants slight mitigating weight. Even if the trial court should have mentioned the guilty plea, any such error was harmless because of the low mitigating weight of the plea.

Brownrigg also claims that the sentence is inappropriate in light of her character and the nature of the offense under Indiana Appellate Rule 7(B). Brownrigg demonstrates positive aspects of her character in that she voluntarily sought help for her drug addiction. She completed a substance abuse treatment program and moved into a transition home that required random drug tests and attendance at four narcotics anonymous meetings per week. Brownrigg also began to attend college in pursuit of a nursing degree. We must also consider the nature of the offense, however. Brownrigg intentionally drove her car into Tigner who was standing next to a police car. She

crushed Tigner's leg and endangered the officer sitting inside the police car. Brownrigg then got out of her car and chased Tigner with a tire iron while stating that she was going to kill her. Brownrigg used the tire iron to hit the police car multiple times. The circumstances of the crime are egregious. We conclude that in light of the nature of the offense, an enhanced sentence of three years is not inappropriate.

Brownrigg also appeals the restitution order of \$2,640 for damage to the police car. Brownrigg argues that the dollar amount of damage to the car was not established and cites Thomas v. State, 840 N.E.2d 893 (Ind. Ct. App. 2006) trans. denied, for the proposition that "proof of matters other than those admitted by a defendant or a criminal history in arriving at a sentencing decision" is required. Appellant's Br. pp. 9-10 n.2. The appeal in Thomas involved a Blakely challenge to the aggravating factors used to order a sentence enhancement. The case is unrelated to restitution. Our supreme court has held that restitution orders are not implicated by Blakely. Prickett v. State, 856 N.E.2d 1203, 1210 (Ind. 2006).

A trial court may order restitution in addition to any sentence imposed for a felony or misdemeanor. See I.C. § 35-50-5-3. The court must base the restitution order upon a consideration of property damages that the victim incurred as a result of the crime based on either the actual cost of repair or replacement if repair is inappropriate. Id. The amount of actual loss is a factual matter that can be determined only upon the presentation of evidence. Shane v. State, 769 N.E.2d 1195, 1199 (Ind. Ct. App. 2002). A restitution order is reviewed for abuse of discretion. Id.

The trial court ordered Brownrigg to pay \$2,640 to the city of Indianapolis. The court arrived at this figure from the probable cause affidavit, which was included in the PSI. The probable cause affidavit contains a statement that the damage to the police car totaled \$2,640.60. At the sentencing hearing, Brownrigg expressed that no corrections needed to be made to the PSI. In Kellett v. State, 716 N.E.2d 975, 980-81 (Ind. Ct. App. 1999), we held that a defendant had waived the error when he failed to object at the sentencing hearing to the inaccuracies in the ledger used to calculate restitution. A specific and timely objection and offer of proof must be made in order to preserve for appeal a claim of error in the admission or exclusion of evidence. Kellett, 716 N.E.2d at 981. Brownrigg did not object to the calculation of restitution at the sentencing hearing; therefore, she has waived any possible error in the state's calculation of property damage.

Conclusion

Brownrigg's sentence of three years incarceration is proper, and she waived any error in calculation of the restitution order. We affirm.

Affirmed.

NAJAM, J., and RILEY, J., concur.